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Supreme Court of the United States

OCTOBER TERM, 1950

No. 149

STATE OF OHIO on the relation of
JOSEPH M. GREISIGER, et al.,

Petitioners,

v.

GRAND RAPIDS BOARD OF EDUCATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OHIO

MOTION FOR LEAVE TO FILE OUT OF TIME A PETITION FOR REHEARING

HAYDEN C. COVINGTON

Counsel for Petitioners

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MAY IT PLEASE THE COURT:

Now come the petitioners and move the Court for an order allowing them to file out of time the accompanying petition for rehearing.

REASONS

Within the time to file following the decision of this Court denying the petition for writ of certiorari on October 9, 1950, the petitioners had no grounds for filing a petition

for rehearing under Rule 33 (2) of the Rules of this Court. Since the rendering of that order (71 S. Ct. 51) circumstances of substantial or controlling effect have intervened the rendition of the order which require the Court to allow the filing of a petition for rehearing out of time pursuant to Rule 33 (2). These reasons are set forth in the accompanying petition and the Court is referred to the petition. It is made a part of this motion. Authority for the granting of this motion is *Zapp* v. *United States*, 330 U. S. 800, where the motion to file out of time and accompanying petition were granted, and *Falbo* v. *United States*, 322 U. S. 770, where the motion to file out of time was granted but the petition was denied.

CONCLUSION

Wherefore petitioners pray that this Court exercise its discretion and that, upon consideration, it grant them leave to file the petition for rehearing which accompanies this motion.

JOSEPH M. GREISIGER,
LLOYD PUSE,
CLIFFORD H. SMITH,
CARL MASELL,
RICHARD E. KREBS,
WILLIAM E. WIENEKAMP, and
JOSEPH M. GREISIGER, JR.,

By

HAYDEN C. COVINGTON

124 Columbia Heights
Brooklyn 2, New York

Counsel for Petitioners

CERTIFICATE

The undersigned counsel for petitioners hereby certifies that the foregoing motion for leave to file the petition for rehearing out of time is prepared and filed in good faith in order that justice may be done, and not for purpose of delay.

HAYDEN C. COVINGTON
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Brooklyn 2, New York
Counsel for Petitioners

FILED
APR 9 19
CHARLES ELMORE

IN THE

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Petitioners,

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GRAND RAPIDS BOARD OF EDUCATION, ET AL.,

Respondents.

RESPONSE OF RESPONDENTS TO PETITIONERS' MOTION FOR LEAVE TO FILE PETITION OUT OF TIME AND TO PETITION FOR REHEARING.

BOWMAN, HANNA & MIDDLETON,
BY MARTIN L. HANNA,
FLOYD A. COLLER,
Bowling Green, Ohio,
Counsel for Respondents.

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Respondents.

RESPONSE OF RESPONDENTS TO PETITIONERS' MOTION FOR LEAVE TO FILE PETITION OUT OF TIME AND TO PETITION FOR REHEARING.

HISTORY

This case was commenced in the Court of Common Pleas of Wood County, Ohio, on December 28, 1948, which Court decided the case in favor of respondents and denied the issuance of a writ of mandamus, which decision was affirmed by the Court of Appeals for the Sixth Appellate District of Ohio. The Supreme Court of Ohio denied and refused to issue a writ of *certiorari*, whereupon relators appealed to the Supreme Court of the United States, which on October 9, 1950, denied the petition for a writ of *certiorari* to the Supreme Court of Ohio (opinions of the Court of Common Pleas and the Court of Appeals are found attached to petitioners' principal brief, page 10, filed on petition for *certiorari* in 1950).

DISCUSSION

The principal ground of relators' petition for rehearing and for failure to file the same within the proper time is that since October 9, 1950, this Court and the Supreme Court of Wisconsin have decided cases in opposition to the Court's decision in this case. First of all we wish to point out that the case of *Niemotko vs. Maryland*, 71 S. Ct. 325, involved Jehovah's Witnesses' use of public parks which is in no case similar to their use of school buildings and is regulated by a different type of statute, and the common law affecting the use of parks is much more liberal than that affecting the use of school buildings. The Wisconsin case relied upon is *Milwaukee vs. Carter*, 45 N. W. 2d page 90, which likewise was not a school building case and which pertains only to the use of public property and its use was being prohibited by a municipal ordinance. These cases, being far removed from the instant case upon the facts, certainly do not give rise to the re-opening of this case.

Neither the *Niemotko* case nor the *Milwaukee* case *supra* brings this case within Rule 33 of this Court providing that grounds for rehearing where the petition for a writ of *certiorari* has been overruled are that intervening circumstances have changed the positions of the parties. These cases do not involve intervening circumstances for from the Common Pleas Court of Ohio to the Supreme Court of the United States petitioners consistently argued and cited park cases, and that was one of their strongest points that in some instances religious groups had pre-prevailed in their use of public parks and therefore they should prevail in the use of public schools (see petitioners' original brief in this court, pages 63 to 68; see our original brief, pages 35 to 38). Furthermore, the use of public buildings was argued by petitioners at the time this case was before the court on petition for a write of *certiorari*

and great stress was placed upon the decision of the Court of Appeals of the Republic of the Philippines in the case of *Fernandez vs. Fernandez*, decided May 29, 1948, a copy of the opinion being filed with petitioners' original brief in this Court. Petitioners also relied upon other recent or pending state cases involving the use of school buildings when this matter was before the court on the writ of *certiorari*, and attached to their brief is a copy of the opinion of the State of California in the case of *Danskin vs. San Diego Unified School District* decided June 26, 1946. The Supreme Court of California in the *Danskin* case held exactly as the Supreme Court of Wisconsin held in the *Milwaukee* case *supra;* therefore, we fail to see that the fact that different states are involved changes the problem or gives rise to intervening circumstances since October 9, 1950.

In their original brief, which the Court considered at the time petition for a writ of *certiorari* was denied, numerous cases were cited involving public parks and great stress was laid upon the Ohio case of *Bigelow vs. Spiegel*, Mayor of Cincinnati, 22 O. C. C. W. S. 337, 43 O. C. C. 595. Therefore, this Court must have believed and held that the park and street cases were not controlling and had no bearing upon this case. That being true in October it certainly is true in April and the fact that different states are holding contrary to the decision of this Court made in October is no different than the fact that some of the states may have held contrary to the decisions of this Court, said decisions being made prior to October, 1950.

The next ground presented by petitioners for reason for rehearing is that there are now three appeals pending before this Court involving the same issue involved in this case. If so, let the issue be decided in the pending cases. This can be done without disturbing the decision of the

Court in this case and putting this small rural school board to great additional expense and the worries of extensive litigation which has now been going on for more than two years.

The last ground is that a federal question does exist. This ground was presented and voluminous authorities cited in petitioners' principal brief which was considered by the Court prior to its decision denying writ of *certiorari* on October 9, 1950. The fact that a federal question did exist was argued through all of the State courts in Ohio and was squarely involved in this matter and was decided by this Court last October, and it need not be decided again in view of the fact that there are no new or intervening circumstances occurring involving that question or proposition.

To sum up petitioners' position in this motion for rehearing, they have waited until long after the time for filing for a rehearing has run and are now merely asking this Court to reverse itself and change its former opinion for the same reasons advanced before the Court's decision of October 9, 1950. In other words, there is absolutely no new or reasonable ground advanced for the review of this case by rehearing, or the modification or vacation of the former order of this Court. Each and every ground that is in issue and which has been advanced was advanced before this Court and the state courts of Ohio a year or so before the *Niemotko* or *Milwaukee* cases *supra*, and we fail to see that the fact that different states are involved is of any importance whatsoever. In closing we wish to point out that each and every case cited in petitioners' brief on rehearing was decided long prior to October 9, 1950, save and excepting the *Niemotko* and *Milwaukee* cases *supra*. Therefore, we can only assume that the Court's decision of October 9, 1950, was made in the light of and

after the consideration of the many other cases cited in said brief. In one of these earlier cases cited, petitioners rely upon *West Virginia State Board of Education vs. Barnette*, 319 U. S. 624, and state that we denied the use of our school building by reason of petitioners' failure to salute the flag. This is absolutely untrue as is shown by the record in this case. The real fact is that we never denied Jehovah's Witnesses the right to use our school building for the holding of religious services therein. In order, however, to avoid strife in the community which would directly affect the school system and be a detriment thereto, the board did always ask and request that all religious sects or denominations use the buildings in union services and in a peaceful and harmonious fashion. Certainly this is not an unreasonable request in view of the position taken by this court in the case of *McCollum vs. Board of Education*, 333 U. S. 203, wherein this Court repeatedly pointed out that school property should be used so as to prevent the school system "from being rent by denomination conflict" and so as to prevent all strife and bickering.

This case is now much older than the *Falbo Jehovah Witness* case cited in petitioners' brief page 5, 320 U. S. 549, 64 S. Ct. 346, 88 Lawyers' Edition, page 305, our case now being twenty-nine months old and the *Falbo* case being terminated in sixteen months. The Court will recall that it made special mention of the fact that Mr. Falbo was still litigating an issue which had been decided sixteen months prior to the Court's decision. The court believed that it was time for such litigation to end, and if that be true, then twenty-nine months is too long to litigate the proposition now before this Court. Certainly this case falls squarely within the decision of the Court in *Chapman and Dewey Lumber Company vs. Board of Directors*, St.

Francis Levy District, 34 S. Ct. 906, 234 U. S. 667, 58 Lawyers' Edition 1526, holding that a petition for review will be denied when the application is without merit.

Wherefore, respondents respectfully petition the Court to end this needless litigation and to deny a rehearing, thus putting an end to this worrisome and vexacious litigation foisted upon this small rural school which does not have sufficient resources, financial or otherwise, to continue with this matter.

Respectfully submitted,

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